

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DifAnkh Asar, Pro-se — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals for The Fourt Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DifAnkh Asar 20694-171
(Your Name)

P.M.B. Talladega, F.C.I.
(Address)

Talladega, AL 35160
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Question(s) Presented: **(1)** Is South Carolina's Code Ann. 16-23-40 Unconstitutional on its face, as applied to Petitioner, and when read in conjunction with other laws because its vague, indefinite, and overbroad, a violation of Petitioner's rights protected under the Fifth and Sixth Amendment(s) to the United States Constitution? **(2)** Did the Fourth Circuit erroneously hold, in conflict with the decisions of this Court in Mathis, 136 S.Ct 2243 (2016), Descamps, 133 S.Ct. 2276 (2013), Curtis Johnson, 559 U.S. 133 (2010), and Taylor, 495 U.S. 575 (1990), that S.C. pointing a firearm offense was a violent felony for the ACCA without employing an element-based categorical approach? **(3)** Is the Fourth Circuit in violation of the Rule set in Apprendi, Is it a violation of Sixth Amendment right to jury, to be enhanced for the ACCA for conduct not reflected in the Statute's elements or admitted to by Petitioner at State level **(4)** Is the Fourth Circuit's holding in King, 673 F.3d 274 (4th Cir. 2012), on its face, as applied to Petitioner, a judicial decision given Ex Post facto effect, a valid due process claim?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at No. 10-5263, 480 F.App'x 207 (4th Cir 2012); or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix G to the petition and is

[X] reported at 2010 U.S. Dist. Lexis 73748 (D.S.C. 2010); or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 28, 2017.

[] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Febuary 06, 2018, and a copy of the order denying rehearing appears at Appendix B.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). This petition is timely filed in accordance with Sup. Ct. R. 13.
1.

The district court had original subject-matter jurisdiction over this case under 18 U.S.C. 3231, and entered its final judgement on Dec. 07, 2010. The Fourt Circuit had appellate jurisdiction under 28 U.S.C. 1291.

[] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924(e)(2)(B) provides:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen (15) years, and; notwithstanding any other provision of law, the court shall not suspend the sentence, or grant a probationary sentence to such person with respect to the convictions under section 922(g)(1).

18 U.S.C. 924(e)(2)(B)(i) provides:

The term "Violent Felony" means: (i) any crime punishable by imprisonment for a term exceeding one year "that" has as an element the use, attempted, or threatened use of physical force against the person of another.

South Carolina's Code Ann. 16-23-410 provides:

It is unlawful for a person to point or present at another a loaded or unloaded firearm.

West Va. Code 6-7-12 provides:

The act requirement can be satisfied by a broad range of conduct involving a firearm, including brandishing a weapon or pointing an unloaded firearm at a person under circumstances that does not involve the use or threatened use of force against the person of another.

Okla. Stat. tit. 21 § 1289.16 provides:

It shall be unlawful for any person to willfully or without lawful cause point a shotgun, rifle or pistol, or any deadly weapon, whether loaded or not, at any person or persons for the purpose of threatening or with intention of discharging the firearm or with any malice or for any purpose of injuring either through physical injury or mental or emotional intimidation, or for purpose whimsy, or prank.... Okla. Stat tit. 21 § 1289.16 (1995).

STATEMENT OF THE CASE

1) The Armed Career Criminal Act, 18 U.S.C. 924(e), is a federal statute that enhances the sentence of certain defendants convicted of being a felon in possession of a firearm under 18 U.S.C. 922(g). In the ordinary case, the maximum punishment for that offense is a 10 year term of imprisonment 18 U.S.C. 924(a). But under the ACCA, in the case of a person who has three previous convictions for a violent felony or serious drug offense, or both, the mandatory minimum punishment is a 15-year term of imprisonment and the maximum is life 18 U.S.C. 924(e).

For close to thirty years this Court has used the Categorical approach to decide whether a prior conviction qualifies as an ACCA predicate. see *Taylor*, 495 U.S. 575, 588 (1990) ("The ACCA provision always has embodied a categorical approach to the designation of a predicate offense".) Under the categorical approach, the federal sentencing court looks only to the least culpable conduct covered by the prior conviction. see *Moncrieffe v. Holder*, 596 U.S. 184, 190-191 (2013) "We must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determined whether even those acts are encompassed by the generic federal offense." (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

If considering only the least culpable conduct, the elements of the crime of conviction are broader than the relevant ACCA offenses, then the conviction can not qualify as an ACCA predicate. see *Mathis v. United States*, 136 S.Ct. 2243, 2251 (2016). (We have often held, and in no uncertain terms, that a

states crime can not qualify as an ACCA predicate if its elements are broader than those of a listed generic offense.); Descamps v. United States, 133 S.Ct. 2276, 2281 (2013) (The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as or narrower.

If, considering only the least culpable conduct, the elements of a crime of conviction are broader than the relevant ACCA offenses, then the conviction can not qualify as an ACCA predicate. see Mathis v. United States, 136 S.Ct. 2243, 2251 (2016), (We have often held, and in no uncertain terms, that a state crime can not qualify as an ACCA predicate if its elements are broader than those of a listed generic offense.); Descamps v. United States, 133 S.Ct. 2276, 2281 (2013) (The prior conviction qualifies as an ACCA predicate only if the Statute's elements are the same as/or narrower than those of the generic offense.)

2) The District Court Sentenced Petitioner Under Residual Clause.

On July 26, 2010 Petitioner Asar pled guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g)(1), 924(a)(2), and 924(e). On December 07, 2010 the district court determined that Petitioner Asar had at least three prior convictions for violent felonies and sentenced Petitioner to 180 months imprisonment to be followed by five (5) years supervised release 18 U.S.C 924(e). The Presentence Investigation report (PSR) recommended that the ACCA enhancement be applied to Petitioner based on the following predicate of

convictions: (1) Burglary; (2) Assault and battery of a High and aggravated Nature; (3) Assault of a High and aggravated Nature; (4) 2cts. Pointing a firearm; (5) Armed Robbery. Based on caselaw developed subsequent to Petitioner's challenges the convictions for burblary, ABHAN, AHAN, no longer qualifies as predicates for ACCA.

Petitioner Asar objected to the ACCA enhancement on the basis that his prior convictions for "Pointing a firearm" did not qualify as a violent felony for the ACCA.

Under the residual clause or the force clause after Johnson v. United States, 559 U.S. 133 (2010), because it is not inherent that force be applied when a violation of section 16-23-410 occurs. Applying the holdings in Thompson v. United States, 891 F.2d 504 (4th Cir. 1989) and Byrd v. United States, 400 F. App'x 718 (4th Cir. 2010), the district court did not address Petitioner Asar's force claim argument and found that his prior conviction qualified for the ACCA under the residual clause and imposed a 15-year mandatory minimum sentence.

3) The Fourth Circuit Affirms.

Petitioner Asar filed a notice of appeal challenging the district courts determination that his two prior convictions "pointing a firearm", S.C. Code Ann. 16-23-410, constitutes a crime of violence under 4B1.2(a)(1) "force clause". The Fourth Circuit of appeal did not address Petitioner Asar's argument as to whether or not the "Pointing a firearm" offense would qualify under the force clause after this Court's holding

in Johnson v. United States, 559 U.S. 133 (2010) and held that the Pointing a firearm offense was a predicate for the ACCA under the residual clause, 4B1.2(a)(2), Byrd v. United States, 400 F.App'x 718 (4th Cir. 2010) and Thompson v. United States, 891 F.2d 504 (4th Cir. 1989). The district court, government, appointed counsel David Plowden and the Fourth Circuit of appeals holds that "regardless of the government's arguement at sentencing, on appeal, and the Fourth Circuits citation in Asar v. United States, No. 10-5263, 480 F. App'x 207 (4th Cir. 2012), finding that a conviction for pointing a firearm constitutes a crime of violence under the residual clause, when the Fourth Circuit decided Asar binding Fourth Circuit authority already existed holding that such a conviction constitutes a crime of violence under the force clause. King v. United States, 673 F.3d 274 (4th Cir. 2012). In King the court looked to the criminal record to determine that S.C. pointing a firearm offense was a violent felony under the force clause. Disregarding this Court's instructions on the categorical approach, the Fourth Circuit's holding here is that the sentencing court can infer the element into the state statute. In this case, the Fourth Circuit inferred that petitioner Asar's prior conviction for pointing a firearm is a violent felony under the ACCA's force clause without applying an elemet-based catergorical approach. Therefore, the Fourth Circuit's holding that Petitioner's prior conviction is a "violent felony" under the force clause is based off how King violated section 16-23-410 in violation of Apprendi v. New Jersy, 530 U.S. 466 (2000).

In *Apprendi*, this Court has held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt". Here the Fourth Circuit raises serious constitutional doubt because it enhanced Petitioner Asar's statutory sentence based on facts that are inferred to exist by the Fourth Circuit but have not been admitted by petitioner Asar nor found to exist by a jury, in violation of the Sixth Amendment.

(4) The Fourth Circuit Denies En Banc Review.

Petitioner Asar petitioned the Fourth Circuit for rehearing en banc, arguing that he has established that his sentence exceeds the authorized statutory maximum penalty of 10-years as a result of the retroactive decision in *United States v. Johnson*, 192, L.Ed 2d 569 (2015) and that if the Fourth Circuit chooses to revisit the argument put before it on May 08, 2012, No. 10-5263 should be reconsidered because it is an infer-the-element approach and overturn King in light of this Court's clear holdings that the Categorical approach is an element-based categorical approach, under which a state offense must have elements which are the same as or narrower than those listed under the generic offense in order to qualify as an ACCA predicate. This case is an ideal vehicle to resolve these conflicts on an important and recurring question of federal law. The Petition for a Writ of Certiori should therefore be granted.

REASONS FOR GRANTING THE PETITION

1). The Fourth Circuit decision creates a direct conflict among the court of appeals for the Fourth Circuit and Tenth Circuit

The Fourt Circuit's holding in United States v. King, 673 F.3d 274 (4th Cir. 2012) is in direct conflict with appeal Courts in both the Fourth and Tenth Circuit on the issue of whether South Carolina's pointing a firearm offense constitutes a violent felony under the force clause for the ACCA. In United States v. Sumpter, U.S. dist. Lexis 1513 (2016), the Court of appeal for the West Va., while reviewing two Sixth Circuit cases Baker, 559, F.3d 443 (6th Cir. 2009) and Meek, 664 F.3d 1069 (6th Cir. 2013), "stated that the "act" requirement of West Va. code 6-7-12 can be satisfied by a broad range of conduct involving a firearm, including brandishing a weapon or pointing an unloaded firearm, at another person under circumstances that does not involve use or threatened use of physical force, against the person of another. Petitioner Asar asserts that even though West Va. 6-7-12 is not the same offense as South Carolina's Code ann. 16-23-410, the elements of West Va. code 6-7-12 pointing an unloaded firearm at another is consisttent with the elements of S.C. code Ann 16-23-410, pointing or presenting a loaded or unloaded firearm at another. The Sumpter court is in disagreement with the Fourth Circuits holding in King, 673 F.3d 274 (4th Cir. 2012) which has held that South Carolina has made it unlawful for a person to present or point at another person a loaded or unloaded firearm, it constitutes a violent felony under the ACCA because South Carolina's Supreme Court required that the government prove that the firearm was pointed in a threatening manner as an element of a conviction under the statute. The Court

of West Va. stated that the cases discussed above Baker and Meek routinely analyzes similar statutes under the residual clause rather than the elements clause precisely because the elements of the crimes do not require use, attempted use, or threatened use of force.

The Tenth Circuit of appeals in *United States v. Hood*, 774 F.3d 638 (10th Cir.) found that a South Carolina's firearm statute was a predicate for the force clause for the ACCA and later recanted and overturned their ruling in *Titties v. United States*, 852 F.3d 1257 (10 Cir. 2017). If the holding in King is applied to Petitioner, it would infringe upon his due process rights to law. He would be applying a Judicial decision with ex post facto effect to enhance Petitioner Asar above the 10-year maximum sentence to a statutory 180 months for the ACCA. This Court has observed that the limitations on ex post facto Judicial decisions making is inherent in the notion of due process, See *Rogers v. Tennessee*, 149 L. Ed. 2d 697 (2000). The Court further states that a Judicial decision that has an Ex Post Facto effect can give rise to a valid due process claim, *Marcus v. United States*, 176 L.Ed. 2d 1012 (2010). If the rationale in King is applied to Petitioner it would violate the principles of fair warning and thus should not be given retroactive effect where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.

2) The Fourth Circuit's decision is in conflict with the decisions of this Court's reasoning concerning the interpretation of the ACCA and the application of the Categorical approach.

This Court has repeatedly held that the ACCA embodies an element-based Categorical approach to the designation of predicate offenses. In ~~two~~ recent cases, this Court emphasized that the key to the categorical approach is elements. Mathis, 136 S.Ct. at 2248; Descamps, 133 S.Ct. at 2283. A prior qualifies as an ACCA predicate only "if the relevant state statute has the same element as the generic ACCA crime." Descamps, 133 S.Ct. at 2283. The Fourth Circuit's decision is in conflict with these decisions because it holds that a prior conviction can qualify as a predicate offense for the ACCA by using Judicial inferred facts rather than an element-based categorical approach.

A. The Fourth Circuit's decision conflicts with this Court's rationale for adhearing to an element-based categorical approach.

In Taylor, and again in Descamps and Mathis, this Court set out three reasons for adhearing to an element-based categorical approach. The decision below conflicts with all three.

First, Congress intended the ACCA to apply uniformly across the country, independent of state law and without regard to state labels, Taylor, 495 U.S. at 590-92. Requiring predicate offenses to match elements with the ACCA offense ensures that teh ACCA is applied fairly and evenly across state lines. The Fourth Circuit in King, 673 F.3d 274 (4th Cir. 2012), relied on the criminal record to determine the generic nature of South Carolina's Pointing a firearm statute and to find that a violation of S.C. pointing a firearm statute was a violent felony for the force clause of the ACCA. Doing so directly conflicts with this Court's instruction to

ignoring state labels in application of the ACCA. As a result the Fourth Circuit's approach incorporates diverse states policies into the ACCA.

This Court's second reason for adhearing to an element-based categorical approach is that it avoids Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to Juries. "Descamps, 133 S.Ct. at 2287. In *Apprendi v New Jersey*, 530 U.S. 466 (2000), this Court held that "any fact that increases the penalty for a crime beyond the prescribed Statutory Maximum must be submitted to a Jury, and proved beyond a reasonable doubt". The Fourth Circuit's decision raises serious constitutional doubt because it enhances Petitioner's statutory sentence based on facts inferred to exist by the court but have not been admitted by the defendant nor found to exist by a jury, in violation of the Sixth Amendment ~~and~~ *Apprendi*.

Although *Apprendi* recognizes an exception for "the fact of a prior conviction" 530 U.S. at 490, that exception allows a Judge to do no more than determine what crime, with what elements, petitioner was convicted of, *Mathis*, 136 S.Ct. at 2252. See also *Descamps*, 133 S.Ct. at 2288-89 ("We have said the sentencing Court can not rely on its own findings about a non-elemental fact to increase a defendant's maximum sentence"). Third, the elemet-based categorical approach avoids unfairness to defendants. By requiring that the predicate offense share the same elements as the ACCA's generic offense, the element-based categorical approach ensures that a fact will enhance a defendant's

sentence under the ACCA only if it was actually at issue and contested in the prior proceedings as observed in Descamps, "a defendant, after all, often has little incentive to contest facts that are not elements of the charged offense and may have good reason not to do so." 133 S.C.t at 2289. Departing from the element-based categorical approach, in practical terms, means enhancing Petitioner's sentence based on facts that the defendant has never had a reason to contest. And as noted in Taylor, the element-based approach also protects defendants from unfairness of having the ACCA's enhancement depend on the statutory labels employed by the state of conviction, labels that may turn on "Vagaries of state law". Taylor 495 U.S. at 588-89. The Fourth Circuit's ruling in King v United States, 673 F.3d 274 (4th Cir. 2012) is unfair to Petitioner because it requires his sentence to be enhanced on facts that were at issue in the prior state proceedings and which, as a practical matter, Petitioner never had any reason or ability to contest.

Inferring the existence of additional elements for the purpose of the ACCA is doubly unfair because it not only relies on facts that were never at issue, but also forecloses Petitioner from putting the facts at issue in federal proceedings.

The Fourt Circuits holding in King infers the use, attempted use or threatened use of force, across the board, for every defendant convicted of violating S.C. Code Ann. 16-23-410 statute. This means that petitioner Asar's sentence is enhanced based upon facts that petitioner originally had no incentive to contest and in federal proceedings, is expressly forclosed from contesting.

The Forth Circuit's decision below is in direct conflict with this Court's expressed instructions on the application of the ACCA and is in conflict with this Court's rationales for adopting the Categorical approach. The Court should grant the petition to resolve these conflicts.

3) The question presented is important and recurring.

This Petition presents an important federal question needing resolution by this Court. The ACCA is a federal sentence enhancement that applies to hundreds of defendants each year. Its consequences are severe. Defendants sentenced under the ACCA face a mandatory minimum of 15 years imprisonment. By contrast, those that do not qualify for ACCA enhancement face no mandatory minimum and a statutory maximum sentence of 10-years imprisonment. Petitioner, for example would have a guidelines sentence range of 77-96 months imprisonment and a statutory maximum sentence of 120 months imprisonment but for the ACCA enhancement¹. Because he was found to qualify for the ACCA enhancement, however, the district court sentenced Petitioner to 180 months imprisonment.

4) This is an Ideal Vehicle.

This case provides the ideal vehicle to resolve the question presented. Petitioner preserved and fully briefed the issue before the district court and Court of Appeals. This also dispositive. Petitioner's sentence can not stand if the question presented is decided in Petitioner's favor.

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According to the presentence report, but for the ACCA, Petitioner Asar's offense level would have been 24 and his criminal history would have been VI. At sentencing, the district court subtracted 3 additional levels for

Additionally, The Fourth Circuit did not analyze the issue in this case, do the elements of South Carolina's firearm statute, Section 16-23-410, match that of the ACCA generic offense. The Fourth Circuit in Sumpter do not agree with the rationales issued in King's Court. The King court used a fact-inferred approach to determine the generic nature of section 16-23-410, while the Court in Sumpter used an elemet-based categorical approach in order to determine that pointing an unloaded firearm at another does not require force, that is strong violent force as required by the ACCA.

The Fourth Circuit is in conflict with this Court's decisions interpreting both the ACCA and the Categorical approach. This case is an ideal opportunity to correct the lower court or, alternatively, to clarify to what extent this Court's prior decisions apply to the ACCA definition of a violent felony.

Finally waiting longer to take up the question presented means that many people in the Fourth Circuit will continue to serve substantially longer sentences than would be imposed in other parts of the country. The inconsistent application of the ACCA is not only unfair, it is an affront to the national uniformity that Congress intended to impose through the ACCA.

The quetion presented is therefore ripe for this Court's review and the Court should grant the petition for Certiorari.

acceptance of responsibility. A total offense level of 21 combined with a criminal history category of VI results in a guidelines range of 77-97 months.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DifAnkh Asar Pro-se 20694-771

Date: 04-17-18